



Australian Federation of
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Title of matter: 4 yearly review of modern awards – Award stage – exposure drafts – technical and drafting issues - Group 3

Section: 156

Matter number: AM2014/241

Award: *Ports, Harbours and Enclosed Water Vessels Award 2010*

Document: Submission of the *Australian Federation of Employers and Industries (AFEI)*, the *Boating Industry Association – Commercial Vessels Division (BIA)*, the *Association of Marine Park Tourism Operators (AMPTO)* regarding the outstanding issue of the rate of pay for work on weekends and incidental matters.

Filed: Pursuant to Decision [2018] FWCFB 6368 (15 October 2018) at paras 175 - 176.

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BEFORE THE FAIR WORK COMMISSION

Fair Work Act 2009

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1. The issue of which rates apply to work on weekend is addressed at paragraphs 2 to 20 of this submission. The capacity to work ordinary hours on weekends is addressed at paragraphs 21 to 28. Clarification of the AFEI proposal of 2 August 2018 is addressed at paragraphs 29 to 35. Proposed clarifying amendments follow after paragraph 36.

RATES FOR WEEKEND WORK

2. With respect to the question of which rates apply to shift work on weekends, the succinctly stated answers are:
 - – for each hour of work on a Saturday, the rate of 1.5 times the ordinary hourly base rate of pay (this does not include any shift rate at cl. 21.2 of the current award),
 - – for each hour of work on a Sunday, the rate of 2 times the ordinary hourly base rate of pay (this does not include any shift rate at cl. 21.2 of the current award).

3. The answers are explained by relevant textual and contextual considerations of the current award, and are addressed further in this submission. In particular, while ordinary time hours are distinct from overtime hours under the current award, the respective rates for ordinary hours on a Saturday and on a Sunday are commensurate with the rates for overtime on a Saturday and on a Sunday. That is to say, the rate for an ordinary hour on a Saturday is of the same proportion as the rate for an overtime hour on a Saturday; similarly, the rate for an ordinary hour on a Sunday is of the same proportion as the rate for an overtime hour on a Sunday. More detailed reasons follow.

Relevant provisions

4. The provisions of the current award which are most directly relevant to determining the rate for hours of work on a Saturday and on a Sunday are:
 - cl. 20.1 (b) - which is in relation to Saturday hours; and
 - cl. 20.3 - which is in relation to Sunday hours.
5. Clause 20.1 (b) provides that employees will be paid ‘*a loading of 50% of the ordinary hourly base rate of pay for all ordinary hours and overtime worked between midnight Friday and midnight Saturday*’. (underling for emphasis)
6. Clause 20.3 provides that ‘*[a]n employee will be paid a loading of 100% of the ordinary hourly base rate of pay for any hours, ordinary and overtime, worked on a Sunday*’. (underling for emphasis)
7. It is submitted that it is an incontrovertible proposition that shift hours are in the nature of ordinary hours of work, albeit the hours usually attract an additional payment. Thus, a shift of ordinary hours is different in character from any overtime hours worked outside of that shift. Although cl. 20.1(b) and cl.20.3 mention both ordinary hours and overtime, the text of each does not suggest any conflation of ordinary hours and overtime; they are separate and distinct concepts within each clause. Accordingly, under the terms of the current award, work hours on a Saturday and work hours on a Sunday will qualify as either:
 - ordinary hours; or
 - overtime.¹
8. It is evident from cl. 20.1(b) that a 50% loading applies to any ordinary hours worked on a Saturday, and that a loading of the same proportion applies to any overtime hours worked on a Saturday. Similarly, it is evident from cl.20.3 that a 100% loading applies to any ordinary hours worked on a Sunday and that a loading of the same proportion applies to any overtime hours worked on a Sunday.

¹ The essential character being that these are hours which fall outside the ordinary hours of work such as, for example, where the employee works beyond the rostered daily ordinary hours.

The ordinary hourly base rate of pay

9. It is also apparent that the relevant loading is derived directly from the rate referred to in each clause as '*the ordinary hourly base rate of pay*'. The expression '*the ordinary hourly base rate of pay*' has significance for the reason that the relevant loading is a percentage of that rate; therefore, to calculate a particular loading, it is necessary to first ascertain the rate that is '*the ordinary hourly base rate of pay*'.
10. The current award does not define the expression '*ordinary hourly base rate of pay*'. However, the *Fair Work Act* provides guidance to its meaning because, at s.16(1), the Act defines the expression '*base rate of pay*' as this:

*The **base rate of pay** of a national system employee is the rate of pay payable to the employee for his or her ordinary hours of work, but not including any of the following:*

- (a) incentive-based payments and bonuses;*
- (b) loadings;*
- (c) monetary allowances;*
- (d) overtime or penalty rates;*
- (e) any other separately identifiable amounts.*

11. In the absence a definition in the current award, the expression '*base rate of pay*' takes its meaning from the *Fair Work Act*.² As s.16 (1)(a)-(e) excludes various monetary items from the statutory meaning, it follows that monetary items in the current award which are in the nature/character of those listed at s.16(1)(a)-(e) are similarly excluded from '*the ordinary hourly base rate of pay*'.
12. As a result, the rate on which the loadings at cl. 20.1(b) and cl. 20.3 are calculated for both ordinary hours and for overtime hours is the hourly rate of pay for ordinary hours of work – as shown, that rate does not include any loadings or penalties which would otherwise apply to the hours of work.

Shift work loadings

13. The current award provides for shift work rates at cl.21.2. This clause is in a table style format and is relatively brief in its terms. That said, it is sufficiently clear that the rates corresponding to each type of shift are essentially multiples of the '*ordinary time rate*'. To illustrate:
 - The afternoon shift rate = 1.15 x the ordinary time rate,
 - The permanent night shift rate = 1.30 x the ordinary time rate.

² As per s. 46(1)(b) of the *Acts Interpretation Act 1901* (Cth).

14. It is implicit in cl.21.2 that the shift premium (or loading) comprises the percentage amount that exceeds 100% of the ordinary time rate. To illustrate:

- The afternoon shift rate comprises 100% of the ordinary time rate plus an additional 15% premium (loading),
- The permanent night shift rate comprises 100% of the ordinary time rate plus an additional 30% premium (loading).

15. This approach shows that the shift work rate is distinct from the ordinary time rate. One is a multiple of the other: the two concepts are not one and the same. Therefore, the shift work rates at cl.21.2 cannot (and do not) represent the '*ordinary hourly rate of pay*' for the purposes of either cl.20.1 (b) or cl.20.3. It follows from this that the shift loadings at cl.21.2 are not included for the purposes of calculating any ordinary time or any overtime worked on a Saturday or on a Sunday. In any event, shift loadings are excluded from '*the ordinary hourly base rate of pay*' for the reason that such loadings and penalties are not included in the meaning of '*base rate of pay*'.³

Rates for ordinary hours on a Saturday and on a Sunday

16. With regard to any shift of ordinary hours on a Saturday or a Sunday⁴, it is the position of the parties to these submissions that the applicable loading is not any of the loadings at cl. 21.2 of the current award, but rather:

- - in the case of Saturday work, the hourly loading is 50% of the ordinary hourly base rate of pay,⁵
- - in the case of Sunday work, the hourly loading is 100% of the ordinary hourly base rate of pay.⁶

Overtime rates for Saturday and for Sunday

17. If the hours are overtime hours, then:

- – in the case of Saturday overtime, the hourly loading is 50% of the ordinary hourly base rate of pay,⁷
- – in the case of Sunday overtime, the hourly loading is 100% of the ordinary hourly base rate of pay.⁸

³ As addressed at paragraphs 9 – 12 of this submission.

⁴ That is, any shift of ordinary hours on a Saturday or a Sunday that would qualify as a shift within the meaning of cl. 21.1 of the current award.

⁵ This rate does not include any shift rate at cl.21.2.

⁶ This rate does not include any shift rate at cl.21.2.

⁷ This overtime rate does not include any shift rate at cl.21.2.

⁸ This overtime rate does not include any shift rate at cl.21.2.

Shift loadings do not combine with weekend loadings

18. Thus it is shown that the current award does not combine shift rates at cl.21.2 with the loadings at cl. 20.1(b) or cl.20.3. That is, shift loadings at cl.21.2 are not included in any calculation of ordinary hours or overtime hours on a Saturday or on a Sunday.
19. The correctness of this approach is reflected in the rates set out at table A.2.1 and table A.2.2 of the most recent Exposure Draft⁹ and by the most recent rates published by the Fair Work Ombudsman¹⁰ – none of these rates implies any compounding of shift rates at cl.21.2 with the weekend rates for ordinary time or overtime at cl. 20.1(b) and cl.20.3.
20. In short, the current award effectively excludes the possibility of shift work rates being paid in addition to weekend loadings.

ORDINARY HOURS CAN BE WORKED ON WEEKENDS

21. The reasoning and conclusions addressed above draw attention to the extent to which the current award accommodates the working of ordinary hours on a Saturday and on a Sunday. As addressed by AFEI in its earlier submission¹¹, the current award recognises that ordinary hours can be worked on a Saturday and on a Sunday.
22. This is not to say that work on a Saturday or a Sunday could not be overtime - indeed particular circumstances may show that the work hours are overtime, and the possibility is evident in the text of the clauses. However, the critical point is this: work is not necessarily overtime just because it is worked on a Saturday or a Sunday.
23. If there is any doubt or contention with the proposition that ordinary hours can be worked on weekends, then it will assist to acknowledge the particular terms of the current award which support the proposition. These are as follows.
24. **First**, cl. 20.1(b) and cl. 20.3 expressly refer to ordinary hours – for convenience, these references are emphasised in the underlined extracts at paragraphs 5 and 6 above of this submission. The expressions must be given meaning and effect. It would be contrary to the rule against surplusage¹² to construe cl. 20.1(b) in such a way that ‘ordinary hours’ becomes superfluous or insignificant. Similarly, it would be contrary that rule to construe cl. 20.3 in such a way that its reference to ordinary hours is superfluous or insignificant.

⁹ Exposure Draft first published 15 January 2016 as amended to 18 July 2017, at Schedule A – Summary of Hourly Rates of Pay, tables A.2.1 and A.2.2, pp.32-33.

¹⁰ See Pay Guide – Ports, Harbours and Enclosed Water Vessels Award 2010 [MA000052], published 28 June 2018 (re rates effective 01/07/2018) at <https://www.fairwork.gov.au/pay/minimum-wages/pay-guides>.

¹¹ AFEI Submission 2 August 2018.

¹² Constructions involving superfluity should be avoided: *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355 at 382 [71] per McHugh, Gummow, Kirby and Hayne JJ; [1998] HCA 28, citing *The Commonwealth v Baume* [1905] HCA 11 ; (1905) 2 CLR 405 at 414 per Griffith CJ.

25. **Second**, the span of ordinary hours at cl. 18.2 of the current award is permissive, not exhaustive. The clause impliedly recognises the possibility of ordinary hours being worked outside the times and days to which it refers. This must be so because each of the following scenarios is permissible under the terms of the current award (and therefore compliant with the award) despite that each scenario involves ordinary hours worked outside the 6am-6pm daily span at cl. 18.2:
- An afternoon shift within the meaning of cl. 21.1(a) finishes after 6.00 pm and at or before midnight,
 - A night shift within the meaning of cl. 21.1(c) finishes subsequent to midnight and at or before 8.00 am.
26. **Third**, the content of the shift definitions at cl. 21.1 does not confine shifts to weekdays as it does not define shifts in terms of specific days of the week. Thus it is open for shifts in the nature of those defined at cl. 21.1 to be worked on weekends, albeit the hourly rate is that provided at cl. 20.1(b) or cl.20.3 for the reasons already addressed in this submission. Succinctly put, the weekend loadings at cl. 20.1(b) and cl.20.3 displace the shift work rates at cl.21.2. Again, it is notable that this position is consistent with the approach to the calculation of the rates of pay in the most recent Exposure Draft.¹³
27. **Fourth**, the proposition is implicit in the definition of ‘**continuous work**’ at cl. 21.1(b) by reason that the definition is concerned with consecutive shifts ‘*throughout the 24 hours of each of at least six consecutive days...*’ (underlining for emphasis).
28. **Fifth**, the proposition is implicit in the content of cl. 22.3 which defines a ‘*shiftworker*’ for the purposes of the NES in terms that would be meaningless if the award did not permit ordinary hours of work on a Saturday or a Sunday. In this regard the clause is directed at two particular circumstances which necessarily require ordinary hours on weekends, those being:
- Where an employee is employed on shiftwork where three shifts per day are worked over a period of seven days per week,
 - Where an employee is regularly rostered to work on Sundays and public holidays.

¹³ See rates at table A.2.1 and table A.2.2 of Schedule A – Summary of Hourly Rates of Pay.

THE AFEI PROPOSAL, 2 AUGUST 2018

29. In its submission of 2 August 2018, AFEI¹⁴ presented the position that the Exposure Draft should be revised to ensure that it is clear that it continues to permit the working of ordinary hours on a Saturday and Sunday, and AFEI presented the terms of the suggested variation to achieve that end.¹⁵ That suggested variation was, essentially, a continuation of text that appears in the current award at cl. 20.1(b) i.e. *'ordinary hours and overtime'*.
30. It was not intended by AFEI that that variation would have any substantive effect on, or change in, award conditions. Further, AFEI does not advocate any variation to the Exposure Draft that would result in any substantive difference in conditions from the current award.
31. The concern that motivated the AFEI proposal was justified having regard to the difference between, on the one hand, the approach to the expression of the conditions at cl. 20.1(b) and cl. 20.3 and, on the other hand, the tabulated approach at clause 12 of the Exposure Draft. These concerns will be readily appreciated by the following explanation.
32. Under the current award, each of the sub-clauses at cl. 20.1(a)-(c) is separated by a semicolon. Thus even though there is relation amongst the subject matter of cl.20.1(a)-(c), each sub-clause is distinctly separate from the others and operates as an independent clause.
33. This means, for example, that an employee's entitlement to be paid rates for overtime worked Monday to Friday¹⁶ is an entitlement different from the entitlement to be paid a rate for ordinary hours worked on a Saturday.¹⁷ Importantly, this approach to drafting emphasises the distinction amongst the entitlements and avoids conflation.
34. However, the current approach is not continued in the table format of cl. 12 of the Exposure Draft. The items mentioned in the introducing text of cl.12.2 are separated by commas, not semicolons. The approach in the Exposure Draft could suggest conflation, rather than separation, of the items addressed, could convey an impression that it is dealing with overtime only – and yet under the current award cl.20.1 (b) and cl.20.3 address both ordinary hours and overtime hours.
35. These concerns are not grammatical trivialities – they have real significance in the immediate proceedings given that the primary focus is upon technical and drafting matters.

¹⁴ Which includes the other parties to these submissions.

¹⁵ AFEI Submission 2 August 2018, para 7.

¹⁶ See cl.20.1(a)

¹⁷ See cl.20.1(b)

PROPOSED AMENDMENTS TO THE EXPOSURE DRAFT

36. The Full Bench has extended the opportunity to propose provisions which clarify the position, notably the position with respect to the span of hours. To assist, the parties to these submissions propose the clarifying amendments which follow below at **A. to D.**

A. Delete cl. 12.1 and cl. 12.2 of the Exposure Draft and with replace with new cl.12.1 (and renumber existing cl.12.3 and 12.4 accordingly):

12.1 Employees will be paid at the applicable rates shown in the table below for:

- (a) any overtime worked Monday to Friday;*
- (b) any ordinary hours and any overtime worked on a Saturday;*
- (c) any ordinary hours and any overtime worked on a Sunday;*
- (d) any ordinary hours and any overtime worked on a public holiday.*

	% of ordinary hourly rate of pay (see definition of 'ordinary hourly rate' at A.1.1 of Schedule A – Summary of Hourly Rates of Pay).
Overtime	
<i>Monday to Friday – first three hours</i>	<i>150</i>
<i>- after three hours</i>	<i>200</i>
Ordinary hours and overtime	
<i>Saturday</i>	<i>150</i>
<i>Sunday</i>	<i>200</i>
<i>Public Holiday</i>	<i>250</i>

B. Replace cl.7.2 of the Exposure Draft with:

7.2 Span of hours

Ordinary hours may be worked:

- (a) *between 6.00am and 6.00pm for up to eight hours per day, Monday to Friday inclusive; or*
- (b) *in accordance with a shift of ordinary hours as per clause 13 'Shiftwork' of this award, or on a Saturday, a Sunday or a public holiday.*

C. Replace cl.13.2 of the Exposure Draft with the following:

13.2 Shiftwork rates

- (a) *Except where the ordinary hours are worked on a Saturday, a Sunday or a public holiday, employees will be paid the following rates for ordinary hours worked on any shift type defined at clause 13.1 of this award:*

Type of shift	% of the ordinary hourly rate (see definition of ordinary hourly rate at A.1.1 of Schedule A – Summary of Hourly Rates of Pay)
<i>Afternoon shift</i>	<i>115</i>
<i>Night shift</i>	<i>115</i>
<i>Permanent night shift</i>	<i>130</i>

- (b) *Where the ordinary hours are worked on a Saturday, a Sunday or a public holiday, the employee will be paid at the applicable rate set out in clause 12.1 of this award.*

D. Delete definition of '**ordinary hourly rate**' at Schedule H – Definitions and replace with:

ordinary hourly rate has the meaning given to it at A.1.1 of Schedule A – Summary of Hourly Rates of Pay of this award.